Issues and Evidence from the United States

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Something akin to schizophrenia often materializes in the responses of otherwise stable people when they become involved in discussions about privatization. It is improbable that the responses flow from a failure to appreciate the general definition of the concept. It is now widely understood that privatization arrangements cast government and not a private firm as the entity that establishes public priorities. It also is understood that privatization involves nothing more or less than efforts to achieve public goals via a reliance on private rather than public means. Notwithstanding a considerable body of evidence regarding various types of privatization that demonstrates that they can yield meaningful cost benefits, however, new privatization proposals routinely confront significant opposition.

One is thus sometimes left with the impression that policy makers are committed, on the one hand, to improving the quality of essential public services and decreasing the costs of providing those services while, on the other hand, to casting public agencies as the exclusive service providers. It is as though policy makers

Notes will be found on pages 47–55.

either consciously ignore or are oblivious to the very real potential for conflict between these two commitments. Still, simple logic makes it obvious that achieving the core goal of simultaneously enhancing service quality and controlling service delivery costs may recommend reliance on *either* public *or* private service providers. Put differently, it should be reasonable to assume that policy makers understand that there is nothing in sound economic theory or sound research evidence that supports the conclusion that public agencies are inherently either more or less efficient and effective service providers than private corporations.

Opposition to privatization is particularly, though not uniquely, strident when the possibility of privatizing secure adult correctional facilities is under consideration. To be sure, nobody would advance the contention that the historical record established by public agencies sets an exemplary performance standard. Still, the hypothesis that private corporations can operate jails and prisons in at least as competent a manner as do public agencies elicits much scepticism and sometimes overt hostility. Indeed, I learned long ago that to offer the pragmatic opinion that, first, a core obligation of elected officials and other government policy-makers ought to be the delivery of the best possible public services at the lowest possible cost and that, second, the public or private identity of alternative providers of services ought to be irrelevant is to invite extreme personal and professional criticism. For example, I have not yet fully recovered from being angrily and loudly described as "the academic whore of the capitalist privateers" by a privatization opponent when I advanced precisely this opinion during a meeting at which I had been invited to speak by the League of Women Voters in Virginia last year.

The critics, of course, do not constitute a homogeneous group; generally speaking, they fall into one of at least two categories. One category contains those who are public employees and many, though not all, of the organizations that represent them.[1] At least in the sizable portion of corrections that involves the management and operation of secure adult facilities (i.e., jails and prisons), these critics have enjoyed what amounts to a non-competitive monopoly that they are committed to preserve. Too often, whether the preservation serves either the public interest or the interest of prisoners is transparently irrelevant to these critics; so, too, is any type of evidence that is contrary to their

narrow self-interest. Fortunately, only the most naive or politically fearful observer would fail to see through the smoke screen created by those who are committed to protecting the monopoly from which they—and sometimes they alone—benefit.

The second category contains people and organizations that offer equally sharp criticism but who do so for far loftier reasons. Their core contention is that it is ethically inappropriate to delegate the power to punish to a private entity whose exercise of such a power might be motivated in no small way by a desire to achieve a financial benefit.[2]

Most such critics understand, of course, that no existing or proposed correctional privatization initiative would permit any private firm to make decisions regarding who is to be confined, or about the duration and conditions of confinement. However, they still cling to the conviction that even the confinement of prisoners by a private firm on behalf of a jurisdiction that independently controls the fact, the conditions, and the duration of confinement is morally repugnant. Indeed, evidence of sound and professional correctional services having been provided by private firms has been insufficient to sway these critics. Their opposition is based on philosophical convictions that no body of evidence would modify. Although I do not concur with all of the conclusions of this set of privatization critics, I view them as people of principle who are to be respected. I also share their view that the darker side of profit motives must not be allowed to shape correctional policy.

This essay will be irrelevant to those who fairly can be assigned to either of these categories of critics. Whether caused by assessments of narrow self-interest or of principle, for them the debate ended before it began. Neither, I should hasten to emphasize, will it be of much relevance for their counterparts on the opposite end of the continuum who are equally persuaded that pairing words like efficient and effective with a word like government automatically creates an oxymoron. For them support for substantially all forms of privatization is both automatic and uncritical.

Between these polar extremes is, I believe, the majority of people whose interest is in having government provide virtually all essential public services in whatever manner can be shown to be the most cost effective.[3] Their judgment necessarily will be shaped more by evidence than by narrow self-interest or philosophical

predisposition. They, reasonably in my view, will dismiss any claim that privatization is somehow intrinsically either inferior or superior to traditional methods of delivering correctional services. Their concerns are largely pragmatic ones. Thus, it is hoped that they will benefit from this effort to provide an overview of the key issues that define the parameters of the debate about correctional privatization and this discussion of what the weight of the available research evidence tells us about those issues.

Because the lion's share of both the evidence and my experience is linked to the American experience, the bulk of the analysis will be based on what has transpired in the United States. Where possible, however, relevant information regarding correctional privatization elsewhere will be taken into account.

Identifying the core issues

There are countless specific issues that those who implement privatization plans are obliged to address. The following list is not exhaustive, but it does provide important illustrations of those issues.

- What type of procurement method best matches the goals of a privatization plan (e.g., a request for bids, a request for proposals, a request for qualifications, etc.)?
- Should public agencies be authorized to submit proposals and, if so, how can one meet the obligation to guarantee that competition between public and private entities will be fair?
- What are the reasonable minimum requirements that all vendors should be obliged to satisfy as a precondition to their being considered for a contract award?
- What weights should one assign to the various elements of proposals vendors submit for evaluation (e.g., construction cost, facility design, operating cost, and program elements of proposals)?
- Should design and construction elements of a project be handled separately as opposed to selecting an integrated design-finance-construct-management approach?
- What should be the source of project financing (e.g., a one-time legislative appropriation, general obligation bonds, a tax-exempt alternative to general obligation bonds, etc.)?

- Should titles to privatized facilities be held by the contracting governmental agencies or private management firms?
- What should be the base term of a management contract?
- Should it be possible to renew or extend a management contract without a requirement for competition between alternative service providers and, if so, what should be the term of the renewal or extension?
- What regulatory standards should one apply to privately managed facilities?
- Should compliance with third-party standards (e.g., the American Correctional Association, the National Commission on Correctional Health Care, etc.) be required?
- What types of performance bonds or performance penalties should one require from or impose on private management firms?
- How should one handle the desire to oblige independent contractors to indemnify and hold harmless the contracting agencies and their officials, employees, and agents?
- Once a contract has been awarded and services are being delivered, by what means should one assure full compliance with contract terms and conditions by an independent contractor (e.g. self audits, periodic inspections by contracting agency personnel, periodic inspections by independent persons or groups, full-time contract compliance monitors, etc.)?

Important as these and other specific issues are to the success of privatization initiatives, they are not the core issues that have shaped the debate about correctional privatization. They are essentially technical questions that must be addressed satisfactorily only by governmental entities that have elected to award facility management contracts. Instead, the parameters of the often-heated privatization debate have been set by a smaller number of questions that, unless answered positively, would preclude privatization altogether, would recommend against it, or would limit its scope on quite matter-of-fact policy grounds. Those questions certainly include the following:

As a matter of law, is it possible for government to contract with a private entity for the management and operation of a jail or prison? At least when the debate began in the early 1980s in the United States, privatization opponents often argued that any full-scale management contracts would be declared to be unlawful on constitutional grounds. Privatization proponents argued that there were no constitutional problems that were not subject to resolution.

Will any jurisdictions be prepared to take the potentially consequential risks that would necessarily be associated with awarding initial facility management contracts without which there could be no concrete tests of the potential benefits of correctional privatization? Privatization opponents reasoned that few or no jurisdictions would explore private alternatives or, if isolated experiments were pursued, that the evidence would come from such atypical facilities as to have no persuasive value. Privatization proponents could do little more than cross their fingers and hope that the pressures confronting at least some jurisdictions would encourage meaningful tests of their theory.

Is there tangible evidence that contracting with a private entity for the management and operation of a jail or a prison can yield cost savings? Privatization opponents continue to argue that private firms cannot possibly provide the full array of essential services at a cost below government agency costs and remain profitable. From the very beginning of the debate privatization proponents contended that the private sector could provide all essential services at a cost significantly below government agency costs and still achieve acceptable levels of profitability.

Is there tangible evidence that contracting with a private entity for the management and operation of a jail or a prison can yield correctional services the quality of which is at least equal to those government agencies provide? Privatization opponents argue that the private sector lacks both the expertise and the motivation necessary to the providing of high caliber correctional services. Privatization proponents claim that private firms can deliver a full range of correctional services at a quality level which is at least equal to what government agencies provide.

If there is evidence that contracting with a private entity for the management of jails and prisons can yield cost savings, does equally tangible evidence reveal that the savings can be achieved without a corresponding decrease in the quality of correctional services? Privatization opponents claim that any cost savings resulting from contract awards to private firms will necessarily be achieved by reductions in the quality of employees, the quality of correctional services, or both. Privatization proponents are persuaded that the private sector can provide services the quality of which is at least equivalent to those of public agencies and still provide meaningful cost savings.

If there is evidence that contracting with a private entity for the management of jails and prisons can yield cost savings without a corresponding decrease in the quality of correctional services, does the evidence suggest that such benefits are limited to specialized types of correctional settings? Privatization opponents are of the opinion that any involvement of the private sector will of practical if not legal necessity be limited to special categories of facilities and/or of the prisoner population (i.e., small facilities, minimum security prisoners, female prisoners, parole violators, etc.). Privatization proponents increasingly often advance the contrary conclusion that the potential benefits of contracting out are not limited by any factors whatsoever.

Little more than a decade ago none of these questions either did or could have answers that were based on hard evidence for the simple reason that there were no privatized jails or prisons. To be sure, at that time supportive evidence flowed from quite a broad array of non-correctional service delivery areas within which the appeal of privatization was growing, from the successful management of facilities housing juvenile offenders, from experience gained via the privatization of individual services required in jails and prisons (e.g., food and medical services), and from the full-scale private management of non-secure adult facilities (e.g., community corrections facilities, halfway houses, work release centers, etc.). The key question, however, remained whether any of that experience with privatization could be generalized effectively if and when the full-scale privatization of jails and prisons became a reality. Unless and until that reality

materialized, both opponents and proponents of full-scale privatization of secure adult correctional facilities could claim virtually whatever they wished to claim with no fear whatsoever that anyone could prove them to be wrong.

Opponents and proponents of privatization are still free to claim whatever they wish to claim. Today, however, those on both sides of the debate are obliged to understand that the risk of being slammed into the hard wall of a rapidly accumulating body of research evidence if they over-state their cases is substantial. In what follows I will make an effort to review a sizable proportion of that evidence.

Overview of the fundamental legal concerns

There probably is no best way to begin to address what lessons the available evidence teaches regarding the key questions. I will try to move forward by simultaneously addressing elements of several of the questions within the context of an historical overview that emphasizes the modern history of correctional privatization and then focusing in some detail on the cost and quality issues, which continue to dominate the debate.

The troubled past of privatization

The analysis being organized in this manner, perhaps the first point that should be made is that opponents of privatization often contend there is nothing new or novel in the involvement of private persons or corporations in our correctional systems. As long as their point is being made at quite an abstract level, the critics are correct. More specifically, many periods of penological history have found government permitting and sometimes encouraging private jailers to exploit and abuse prisoners (see, e.g., Sellin 1976; Cohen 1976; Eriksson 1976; McKelvey 1977; Keve 1986; Lichtenstein 1993; Shichor 1995). For example, the masters of the English Bridewells, the first of which was opened in London in 1556, were in some regards entrepreneurs who were authorized to exploit the prisoners committed to those early correctional facilities (Sellin 1976: 74). Much the same appears to have been true of roughly comparable facilities that were opened in Amsterdam at the end of the sixteenth century (Sellin 1976: 78). Further, as recently as the 1920s in the United States, both Alabama and Florida were involved in convict lease arrangements with private firms that yielded significant financial benefits to both the firms and the coffers of the jurisdictions (McConville 1987). Clearly, however, comparable benefits did not reach the prisoners whose labor potential was so thoroughly and often brutally exploited by these alliances between government and the private sector.

No ethically responsible person could possibly justify any policy that would give rise to a form of correctional privatization that would either authorize or tolerate a return to these dark days of our penological past. Still, the rhetoric of many privatization opponents often implies or asserts that there is little to prevent the abuses of the past from rematerializing in the present.

At least in the United States, any such implication or assertion is clearly invalidated by the fundamental changes that have transformed relevant portions of the correctional landscape. Of special relevance to this transformation is how both the courts and legislative bodies in the United States have dramatically modified the legal position in which both prisoners and private corrections management firms now find themselves. The significance of this is so considerable that it warrants at least some discussion here.[4]

Legal barriers to the problems of the past: some American examples

It is appropriate to begin this portion of the analysis by noting that multiple and quite fundamental changes materialized before any government agency evaluated the possible value of correctional privatization in any of its contemporary forms. Although the details of the changes would require a complex and lengthy analysis, suffice it to say that the position in which prisoners found themselves as recently as a century ago were bleak at best. As announced in the 1891 decision of the Virginia Supreme Court in *Ruffin* v. *Commonwealth*—to choose the most obvious example:

> [A prisoner] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accord him. *He is, for the time being, the slave of the State.* (21 Grat. 790 [Va. 1891], *emphasis added*)

Judicial activism as a source of change This unequivocal position and the only modestly softer hands-off doctrine that displaced it during roughly the first half of the twentieth century did not sur-

vive the judicial activism of the 1960s (see Krantz and Branham 1991). In particular, a set of decisions announced by the United States Supreme Court in such landmark cases as *Monroe* v. *Pape*, 365 U.S. 167 (1961), and *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), transformed a pre-existing provision of federal civil-rights law whose origins are in the Civil Rights Act of 1871 (42 U.S.C. §1983) from a largely dormant statute into the dominant force it is today.

Most easily understood as the civil enforcement mechanism for the Due Process Clause of the Fourteenth Amendment, §1983 provides a cause of action for any person, including any prisoner, who confronts a deprivation of a constitutional right as a consequence of "state action."[5] Under the more recent holding of the Supreme Court in *West* v. *Atkins*, 487 U.S. 42 (1988), private persons providing constitutionally mandated services under contract for local and state correctional agencies are subject to suit under §1983. Further, prisoner plaintiffs who satisfy the "prevailing party test" forged by the Supreme Court in such cases as *Maher* v. *Gagne*, 448 U.S. 122 (1980), *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), *Hewitt* v. *Helms*, 482 U.S. 755 (1987), and *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), can recover reasonable attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976, which amended 42 U.S.C. §1988. Further still, it is settled law that the array of equitable and legal remedies now available to prisoners housed in private correctional facilities in the United States is broader than is the set of remedies made available to their counterparts in public facilities (Thomas 1991).

It is true, of course, that the changes in the legal position of prisoners described above are based on judicial interpretations of statutes that Congress enacted to guarantee rights secured by the Constitution of the United States, but it must also be emphasized that the present situation in America is shaped by legislative as well as judicial influences. Numerous examples of this could be provided, but a few comments about how the Florida legislature responded to the prospect of local- and state-level privatization will adequately illustrate the points I wish to make.

Statutes as a source of change in Florida In part for reasons related to interpretations of the requirements imposed by Florida's constitution, it is probably true that no full-scale correctional privatization initiative in Florida would have been immune to

constitutional challenge had the legislature not enacted legislation (a) that reflected a clear public policy choice and (b) that protected both the public interest and the interests of prisoners by establishing clear standards regarding the limits within which any powers it delegated to a private entity must be exercised (Thomas, Lanza-Kaduce, Hanson and Duffy 1988). The policy choice and the standards are set forth in at least three separate portions of the Florida statutes: §951.062, which authorizes boards of county commissioners to contract with private firms for the operation of county jails and detention facilities, §944.105, which authorizes the Florida Department of Corrections to contract with private firms for the operation of any size or type of state prison, and the Correctional Privatization Commission Act, which is codified by Chapter 957.[6]

The most important and striking features of what the Florida legislature put in place—and what, albeit to various degrees, one finds in many other American jurisdictions—fall into two general categories.[7] Both categories are well-illustrated by the Correctional Privatization Commission Act. First, management firms are expressly prohibited from making a broad range of decisions that have implications for who will be confined, where prisoners will be confined, work requirements prisoners will confront, and when prisoners will be eligible for release (§957.06, Florida Statutes). Second, the requirements imposed on private management firms are significantly more demanding than are the requirements the law imposes on the Florida Department of Corrections. Obvious examples of this include the requirements that

- the costs for operating private facilities must be at least 7 percent below the costs associated with the public operation of comparable state facilities (§957.07)
- private firms lack the right to assert the sovereign immunity from tort suits even though such a limitation on legal liability is enjoyed by the department (§957.05(1))
- private firms must obtain insurance sufficient to indemnify and hold harmless the state of Florida from all sources of legal liability, including civil rights liability (§957.04(3)(b)), even though the department has no comparable obligation
- the employees of private firms must meet the training and certification requirements imposed on similar employees of

the department or those of the American Correctional Association with whichever set of standards are the more demanding being applicable (§957.05(2))

- private firms must meet a statutory duty to provide work and education programs designed to reduce recidivism (§957.04(1)(f)) even though the Department has no such legal duty
- private facilities must be monitored for compliance with legal and contractual duties via the efforts of a full-time, on-site contract-compliance monitor who is a Commission employee (§957.04(1)(g)), even though no equivalent person is assigned to any department facility
- private firms must seek, obtain, and maintain accreditation by the American Correctional Association even, though facilities operated by the Florida Department of Corrections confront no accreditation requirement (§957.04(3)(c)).

Conclusions regarding the legal issues

At least to the degree that the American experience is similar to the experience of other nations that have privatized correctional facilities (i.e., Australia and the United Kingdom), then the legal context within which private corrections management firms are obliged to operate today bears no resemblance to what one would have found even a few decades ago. No longer cast in the powerless role of slaves of the state, American prisoners can and do aggressively litigate their claims of having been treated unreasonably. This is true without regard to whether they are housed in publicly or privately managed correctional facilities. Further, statutory limitations on the power that can lawfully be exercised by a private corrections management firm are considerable. Further still, the regulatory context within which private management firms are obliged to operate—as illustrated by requirements in Florida and other jurisdictions for on-site government contract-compliance monitors and compliance with non-governmental accreditation bodies—routinely subjects them to higher levels of scrutiny that their public agency counterparts. Finally, the opinion often advanced by privatization critics that contracting out schemes would quickly be found to be unlawful finds no support whatsoever in American

legal experience. No court has invalidated a contract award on constitutional grounds at any point during the modern history of correctional privatization.

The modern history of correctional privatization

Well before the first secure adult facility was privatized, some degree of reliance on privatization in American corrections—even if one ignores the troubled past of what amounts to the pre-modern era—was in place via contracts for the private management of juvenile facilities and of non-secure adult facilities (e.g., work-release facilities) as well as contracts for the delivery of specialized services (e.g., food and medical services) (Camp and Camp 1984; Mullen, Chabotar, and Carrow 1985). Although few if any predicted that the scope of privatization initiatives would broaden, the fact that American prisoner populations began to leap ever higher by the mid-1970s and thereby tax the limits of what state and local correctional systems were capable of handling played a pivotal role in pushing correctional systems all across the nation to seek out alternatives to a business as usual approach.

The initial contract awards by local, state, and federal agencies

The leading edge of the correctional privatization movement began to form during the early 1980s with modest contract awards by the Immigration and Naturalization Service and the United States Marshals Service to such pioneering firms as Behavioral Systems Southwest and Eclectic Communications, Inc.[8] Practically speaking, however, the privatization alternative did not attract serious attention until several key developments materialized a few years later.

The first county-level awards of management contract came in 1984, when Hamilton County (Chattanooga), Tennessee, awarded a contract to the Corrections Corporation of America. The first state-level contract award came in 1985, when Kentucky contracted with the United States Corrections Corporation. The first significant federal award came in 1984, when the Immigration and Naturalization Service contracted with the Corrections Corporation of America for management of the Houston Processing Center.[9]

The importance of these contract awards to the subsequent development of correctional privatization would be difficult to

overestimate and the fact that all remain still in force today with the same management firms is, at least, an oblique indicator of good performance.[10] Each provided a real-world opportunity to test the hypothesis that contracting could yield meaningful benefits to government. Each also provided an valuable model that subsequent units of government could examine and improve upon in such critical areas as procurement strategies, the formulation of sound contracts, and the creation of effective means of contract monitoring.

Notwithstanding the value of the multidimensional testing ground established by the early contract awards, a host of obstacles still stood in the paths of those who deemed correctional privatization to be a significant innovation. Corrections is a field that tends to be so conservative that the diffusion of innovations is seldom swift. As recently as the early 1980s, no jurisdiction in the United States enjoyed express statutory authority to contract for the operation of either jails or prisons. At least during those years, members of legislative bodies were not inclined to venture into such novel and potentially risky areas of law and policy. Few if any public agencies were enthusiastic about awarding facility management contracts, and more than a few opposed the concept quite vigorously.[11] Public employee unions were angered by the possibility that one of the rapidly decreasing areas within which their members enjoyed a non-competitive monopoly would disappear. Other groups with a vested interest (e.g., the American Civil Liberties Union, the American Jail Association, and the National Sheriffs Association) voiced harsh opposition to full-scale facility management by the private sector. The time lag between the adoption of suitable enabling legislation, the initiation of procurement processes, contract awards, and facility openings often was considerable.

Suffice it to say that these and related obstacles precluded any possibility that the progress of privatization proponents would be dramatic. Indeed, the early developments were relatively few and far between.

The transition to maturity for the private corrections industry

Although informed commentators might differ in their judgments regarding when the tide began to turn in favour of privatization, the key influence was quite probably the 1988 decision of the Texas Department of Criminal Justice to award contracts for two 500-bed facilities to the Corrections Corporation of America and contracts for two 500-bed facilities to the Wackenhut Corrections Corporation.[12] All four contracts were made pursuant to a Texas statute that mandated at least a 10 percent cost savings. All four contracts imposed upon the two management firms performance standards that were more demanding than the standards that had to be satisfied by the public agency. Even though a different Texas correctional agency and correctional agencies in other jurisdictions had awarded facility management contracts prior to these awards in Texas to the Corrections Corporation of America and the Wackenhut Corrections Corporation (e.g., awards at the local level in Florida, Pennsylvania, New Mexico, and Tennessee; awards by the state in California, Kentucky, and Texas; and federal awards for facilities in California, Colorado, and Texas), the sheer magnitude of this single announcement produced shock waves both throughout and far beyond the boundaries of the United States.

That subsequent developments greatly accelerated the pace at which the embryonic private corrections industry moved toward maturity is altogether obvious. A decade ago, for example, the capacity of all secure adult private correctional facilities in operation or under construction was only 2,620 prisoners. Although the capacity had risen substantially to 15,300 prisoners by the close of 1990, the future of the privatization movement remained ambiguous. Since then, however, the rate of growth as measured by the number of beds under contract has leaped forward at an average annual pace of 34.51 percent. Statistics for the end of 1995 revealed 104 contract awards with an aggregate capacity of 63,595.[13]

Significantly, there are no indications that the momentum the private corrections industry achieved during the first half of the present decade is lessening. Early July of 1996 finds 17 private corrections management firms that have received or are presently negotiating contracts for 119 secure adult facilities that are or will be located in Australia (6), Canada (1),[14] the United Kingdom (6), and the United States (106). The estimated capacity of all of these facilities is 76,432 prisoners, which reflects a 20.19 percent increase over the total at the end of 1995. Further, if procurement that is expected to reach closure during the balance of 1996 yields what it is anticipated to yield, a reasonable projection for the end of 1996 would be for approximately 130 facility contract awards that would provide housing for more than 85,000 prisoners.